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No. 96-110

IN THE

Supreme Court Of The United States

October Term, 1996

STATE OF WASHINGTON, *et al.*,

Petitioners,

vs.

HAROLD GLUCKSBERG, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE RUTHERFORD INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the United States Constitution grants or gives individuals a constitutional right to commit suicide and therefore, whether states should be allowed to prohibit physician assisted suicide.

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The Rutherford Institute, ("TRI") respectfully submits this brief as *amicus curiae* in support of Petitioners' position that a state may ban physician assisted suicide. Pursuant to Sup. Ct. Rule 37.2, the parties have consented to the filing of this brief. TRI has filed its Sup. Ct. R. 37.2 written consent with the Clerk of this Honorable Court.

INTEREST OF THE AMICUS CURIAE

This case presents important issues affecting the fundamental right to life of all Americans. The American legal tradition has placed the preservation, protection and prolongation of life at the highest level -- the point of sacredness. The right to life is enshrined in both the Fifth and Fourteenth Amendments as well as the Declaration of Independence. Respondents attempt to greatly reduce the inherent value of the most precious and basic American right. The

Rutherford Institute opposes this attempt to undercut the value of human life.

The Rutherford Institute, (hereinafter "TRI") is a non-profit religious based civil liberties organization that defends the rights of persons of all religious faiths throughout the United States on a *pro bono* basis. TRI defends school children that wish to pray before school, trains attorneys in First Amendment litigation, addresses pro life issues and educates the general public regarding various religious legal issues. J.W. Whitehead, *The Rights Of Religious Persons In Public Education*, 333 (Crossway Books, 1991). Protecting the religious rights for all Americans in the face of direct attack on those rights is the interest of TRI.

SUMMARY OF ARGUMENT

There is no constitutional right to physician assisted suicide under the Fourteenth Amendment of the U.S. Constitution and thus states should be allowed, under the Tenth Amendment of the U.S. Constitution to regulate and prohibit this form of homicide just as states regulate other social protection measures and moral issues such as seatbelt laws, sexual relations with minors and motorcycle helmet laws.

ARGUMENT

Whether the United States Constitution grants or gives individuals a constitutional right to commit suicide and therefore, whether states should be allowed to prohibit physician assisted suicide.

U.S. Solicitor General, U.S. Attorney General, New Dealer, Associate Justice of the U.S. Supreme Court and now prophet Robert H. Jackson once said:

> This Court has gone far toward accepting the doctrine that civil liberty means the removal of all restraints...and that all local attempts to maintain order are impairments of the liberty of the citizen. The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.

Terminello v. City of Chicago, 337 U.S. 1, 37 (1949), (Jackson dissenting). Although Mr. Justice Jackson spoke in figurative terms, today this Honorable Court must decide if it wishes to literally enter into and approve a suicide pact with Jack Kervorkian. To meet the terms of this pact, this Honorable Court must reject a pre-existing national pact with the citizens of the United States which states:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain *unalienable* Rights, that among these are *Life*.

The Declaration of Independence at Preamble (U.S. 1775). *Emphasis added.* TRI respectfully asserts that a pact with this nation that stands as the lynch-pin premise of this government should leave state statutes prohibiting physician assisted suicide alone. *See* U.S. Const. amend. X.

"In the West, both church and state have historically assumed roles in the control of suicide". Reich, 5 *Encyclopedia of Bioethics*, "Suicide" 2448 (MacMillan, 1995). Saint Augustine condemned suicide as a violation of God's great gift of life. O. Russell, *Freedom to Die: Moral and Legal Aspects of Euthanasia*, 77 (1976). Aiding and abetting a suicide or attempted suicide is a crime in all U.S. jurisdictions. *The Guide To American Law*, "Suicide" 428 (West, 1984). Prior to the two cases before this Honorable Court, no constitutional right to commit suicide existed. Reich, *Encyclopedia of Bioethics*, "Suicide" 2448 (MacMillan, 1995). The American Medical Association still adheres to its view that physician assisted suicide is improper -- even as the current

debate rages on. *The Guide To American Law*, "Biomedical Ethics" 38 (West Supp. 1995).

It is basic "black letter" law that states have an interest in preventing suicides and that courts have traditionally made a distinction between a terminally ill patient refusing food/medicine for themselves and a patient taking active steps to kill themselves. 22A Am. Jur. 2d "Death" sec. 582 at pages 552 to 554. Assisting or encouraging another to commit suicide has been considered a state criminal offense in America for over two centuries. *See generally*, 40 A.L.R. 4th 702 at sec. 6 (Law Co-Op Supp. 1996), citing *Commonwealth v. Bowen*, 13 Mass. 356 (1816) *et al.* To adopt Respondent's argument that tradition and common law allow physician assisted suicide means that long-standing precedent must be ignored. *See*, *Cruzan v. Director, MO. Health Dept.*, 497 U.S. 261, 294-295 (1990), (Scalia, concurring). As a matter of fact, to adopt Respondents' argument means that America embraces views that justified death camps in Nazi Germany! See Alexander, "Medical Science Under Dictatorship", 241 New Eng. J. Med. 39 (1949) where Dr. Leo Alexander, famed expert of the Nuremberg War Crimes trials, said "...it all started with the acceptance of the *attitude*, basic to the euthanasia movement, that there is such a thing as a life not worthy to be lived". *See also*, *The Holy Bible*, 1 Sam. 31:4-6. Contrary to the views of the Second and Ninth Circuits[1] in the pending cases before this Honorable Court, (*Vacco* and *Glucksberg*), "[t]hat which is not just is not law". *Eigen & Siegel*, *The MacMillan Dictionary of Political Quotations*, Ch. 50 "Justice" at 311 n. 26 (MacMillan, 1993). *Accord*,

[1] It is interesting to note that Mr. Justice Jackson, who warned of the proverbial "suicide pact" in *Terminello* was from New York and the Circuit Justice for the Second Circuit where the *Vacco* case originates. [*See e.g.*, 93 L.Ed. at page iv].

"An act against natural equity is void". *Id.* at 312 n. 46.[2] *See also*, *Catechism of the Catholic Church*, at sec. 2280 and 2281.

The gist of TRI's argument is articulately presented by Mr. Justice Scalia's concurrence in *Cruzan v. Director, MO. Health Dept.*, 497 U.S. 261 (1990). Mr. Justice Scalia made the following observations:

A) this Honorable Court should not interfere with Xth Amendment state issues such as suicide, *Cruzan*, 497 U.S. at 293.

B) states have the authority to prevent suicides, *Cruzan*, 497 U.S. at 293 and Ala. Code sec. 13A-3-4; and

C) no "substantive due process" claim can be made without a clear showing of a historically acknowledged protected interest and no such interest exists in the area of suicides. *Cruzan*, 497 U.S. at 294-295.

Mr. Justice Scalia noted that no right to kill oneself existed at the time of William Blackstone; it does not exist today; and no justification exists for a future modification of the long-standing rules regarding suicide. *Cruzan*, 497 U.S. at 296-300. More importantly, Justice Scalia correctly noted that the question of how a state addresses and regulates physician assisted suicide is a state, not federal, issue. *Cruzan*, 497 U.S. at 293, *accord U.S. v. Lopez*, 514 U.S.___, 131 L.E.2d 626, 642-643 (1995) which stands for the proposition that the federal government should not arbitrarily expand federal police powers at the expense of states' rights.

A case that weighs heavily on the consideration of the case at hand is *Bowers v. Hardwick*, 478 U.S. 186 (1986). In *Bowers*, this Honorable Court found that no constitutional "privacy" right to commit homosexual acts exists. *Bowers*,

[2] Note 26 quote William Lloyd Garrison, noted Civil War abolitionist and newspaper editor. Note 46 quotes James Otis, a member of the Colonial Massachusetts legislature.

478 U.S. at 190-191. More relevant to the case at hand is the finding that "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution". *Bowers*, 478 U.S. at 194. The Court went on to remind Americans that states do have the power to set moral laws for the citizens of its states. *Bowers*, 497 U.S. at 196. The logic of *Bowers*, that a state can dictate basic morals, applies equally to the moral dilemma of denying a patient physician assisted suicide.

In the area of a government setting minimal standards of moral decency. Some examples are:

1) The Mann Act. 18 U.S.C. sec. 2421 to 2424;
2) Statutory rape statutes. *See e.g.*, Tenn. Code Ann. sec. 39-13-506; Ala. Code sec. 13A-6-61(a)(3) and Ky. Rev. State. 510.050; and
3) Contributing to the delinquency of minors statutes, *See e.g.*, Tenn. Code Ann. sec. 37-1-156 and Ala. Code sec. 12-15-13.

Governments even set mandated minimal standards for wearing seatbelts in automobiles, *See e.g.*, 49 U.S.C. sec. 30127(d) and Ala. Code sec. 32-5B-1 *et seq.*, and the wearing of motorcycle helmets. *See e.g.*, Tenn. Code Ann. sec. 55-9-302 and Ala. Code sec. 32-12-42. States clearly have the power to mandate morality rules in the area of physician assisted suicide and the federal government should not infringe into this Xth Amendment states' rights area.

In closing, TRI respectfully takes issue with the Respondents' implicit claim that anybody who has ever faced a terminally ill family member's painful death would support physician assisted suicide. The author of this brief lost his father to progressive cancer which arose in 1991. The funeral took place on Father's Day, 1993. In the final stages of his life, (two years), Mr. Smith faced constant pain and mental delusions. After careful consideration, TRI's counsel still opposes physician assisted suicide. Obviously, this small example circumvents Respondents' claim that "everybody is on our side". Physician assisted suicide is morally wrong and should be outside of the purview of federal judicial intervention. *Cf.*, *Dick v. N.Y. Life Ins. Co.*, 359 U.S. 437, 442-443 (1959) for an acknowledgment by this Court of a valid statutory presumption *against* suicide. Every criminal statute in America sets a minimum base for acceptable morals. As noted in *Bowers*, "...if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed". *Bowers*, 478 U.S. at 196. It is unjust, impractical and illogical to find laws making physician assisted suicide unconstitutional simply because said laws make a moral choice to declare that facilitating an intentional killing is a crime.

CONCLUSION

The opinions of the Second and Ninth Circuits should be overturned as no constitutional right to physician assisted suicide exists under the U.S. Constitution.

This is the 11th day of November, 1996.

Respectfully Submitted,

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